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In The

Supreme Court of the United States

October Term 1997

SHARON SEEGER

Petitioner,

V.

SHIRLEY S. CHATER,
Commissioner of Social
Security Administration

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHANIE M. SIMPSON, Esquire
11743 Seminole Circle
Northridge, California 91326
(818) 360-4076

Counsel for Petitioner

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QUESTIONS PRESENTED

1. May the Commissioner of Social Security Administration consider as an overpayment Social Security Disability benefits lawfully awarded following an administrative hearing by an Administrative Law Judge assigned to the Social Security Administration in its own Office of Hearings and Appeals where that decision has not been appealed and no further action taken by the Commissioner with reference to that decision?

2. May the Administrative Law Judge disregard his duty of fully and fairly developing the record to insure that claimant's interests are considered?

PARTIES

The parties to the appeal to the United States Court of Appeals for the Ninth Circuit are Sharon Seeger, Plaintiff-Appellant, and Defendant-Appellee Shirley S. Chater, Commissioner of Social Security Administration.

TABLE OF CONTENTS

Table of Authorities v

Petition 1

Memorandum and Orders Below 2

Jurisdiction 4

Statement of the Case 5

Reasons for Granting Writ 12

Conclusion 24

Index to Appendices

Appendix A Unpublished Memorandum of the United States Court of Appeals for the Ninth Circuit, Number 95-55870 . . . . . A1-A5

Appendix B Plaintiff's Petition for Rehearing before the United States Court of Appeals for the Ninth Circuit A6-A33

Appendix C Denial of Rehearing by the United States Court of Appeals for the Ninth Circuit A34-A37

Appendix D Notice of Favorable Decision of the Social Security Administration Issued April 29, 1976. A38-A45

Appendix E Report and Recommendation of United States Magistrate Judge Filed April 18, 1995 . . . A46-A70

Appendix F Plaintiff's Objections to the Report and Recomdation and Proposed Judgment of the United States Magistrate Judge Dated April 24, 1995 . . . A71-A81

TABLE OF AUTHORITIES

CASES

Brown v. Heckler
713 F. 2d 441 (9th Cir. 1983) .. 17,20

STATUTORY PROVISIONS

Code of Federal Regulations, Title 20:

Regulation 404.501 17
Regulation 404.502a 20
Regulation 404.946 16
Regulation 404.1589 18

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

SHARON SEEGER,

Petitioner,

V.

SHIRLEY S. CHATER,
Commissioner of Social
Security Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Sharon Seeger respectfully prays that a Writ of Certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit filed on August 14, 1996.

MEMORANDUM AND ORDERS BELOW

The Ninth Circuit memorandum, filed August 14, 1996, is set forth in Appendix A. Plaintiff's Petition for Rehearing is set forth in Appendix B. The Ninth Circuit Order, filed September 12, 1996, denying Petitioner's request for rehearing of the August 14, 1996 memorandum is set forth in Appendix C. Notice of Favorable Decision of the Social Security Administration issued April 29, 1976 is set forth in Appendix D. The Report and Recommendation of United States Magistrate Judge, Central District of California, filed April 10, 1995, is set forth in Appendix E. Plaintiff's Objections to the Report and Recommendation and Proposed Judgment of the United States Magistrate Judge

dated April 24, 1995 are set forth in Appendix F.

JURISDICTION

The Court of Appeals Memorandum in this matter was filed on August 14, 1996. A timely Petition for Rehearing was filed on August 28, 1996. The Court of Appeals' denial of the Petition for Rehearing was filed on September 12, 1996 and is set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court, Central District of California, had jurisdiction pursuant to Section 405(g) of the Social Security Act, as amended (42 U.S.C. 205(g)).

Petitioner, born June 18, 1948, was awarded Social Security Disability benefits in 1972. Benefits were terminated on the basis she was no longer disabled in August 1975. Seeger testified at an administrative hearing on March 5, 1993 that she went to an administrative hearing in 1976 in the same building where she was then testifying and disability benefits were reinstated. This evidence was not produced at hearing. Respondent's Memorandum of Points and Authorities submitted to United States District Court, Central

District of California, contained in the appendix a copy of Administrative Law Judge (ALJ) Parmelee's decision verifying that Seeger's disability benefits were reinstated based on the decision of April 29, 1976.

Seeger testified she attempted part-time work for JANCO Corporation in 1975 using her sister Carol's Social Security Number (559-72-7041) as she was attempting to hide from her brutal, abusive ex-husband, who had also molested her minor daughter (from a prior relationship). She worked part-time less than a year as she needed more knee surgery.

In 1980 her ex-husband forced her to use his daughter's Social Security Number (553-19-9341) and she worked one day. She did not work from 1975 to 1979 and did only some part-time work in 1979 and one

day in 1980. Respondent claims a picture of Seeger was submitted to various employers who identified her as an employee. The picture used was not produced at hearing, nor was anyone who was supposed to have identified Seeger as an employee at the various employers where it is claimed she worked. Prior to the hearing Seeger reviewed her earnings record at the Social Security District Office and informed the Administration she did not work for the employers listed thereon during the time specified in the earnings record. Seeger testified benefits stopped in 1981 and she only received one check in 1982. Seeger continued to have treatment and surgeries on both knees from 1975 to 1983.

Seeger was first notified of an alleged overpayment in 1981. That document was not a part of the official

administrative record. Petitioner's request for waiver of the alleged overpayment was denied on May 14, 1992. On October 25, 1986 a Claims Collection Report was sent by the Social Security Administration to Civil Division, Department of Justice, for a decision to discontinue collection efforts. On December 17, 1986 the Social Security Administration sent Seeger a letter informing her it was decided to discontinue further collection efforts but that decision does not relieve her of the liability of overpayment of the debt and any future benefits that may become payable will be withheld to recover the overpayment. The Statute of Limitations on the collection ran on February 3, 1990.

Following the administrative hearing on March 5, 1993 the ALJ issued a decision

finding Seeger not without fault in the overpayment of $33,075.00 ($22,038.80 attributable to Petitioner and $11,036.20 attributable to her minor daughter) and that recovery of the entire amount against her is not waived. Seeger's minor daughter, a beneficiary of the disability benefits, was found without fault and recovery of any overpayment against her would be against equity and good conscience.

The Appeals Council denied the Request for Review on January 17, 1994. A timely complaint was filed in United States District Court, Central District of California. Following submission of Motions for Summary Judgment by parties the United States Magistrate Judge filed Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment on April 18, 1995.

Seeger filed objections to the Report and Recommendation and Proposed Judgment on April 25, 1995. On May 15, 1995 the District Court adopted the Report and Recommendation of the United States Magistrate Judge and denied Seeger's Motion for Summary Judgment.

On June 2, 1995 a timely appeal was filed in the United States Court of Appeals for the Ninth Circuit. Following submission of briefs and oral arguments the Ninth Circuit Court of Appeals issued Memorandum on August 14, 1996 affirming the decision of the United States District Court, Central District of California, finding that the ALJ's decision that Seeger was not without fault in accepting overpayments is supported by substantial evidence in the record.

Petitioner argued before the Ninth Circuit Court of Appeals that the Court did not consider that Seeger was receiving Social Security Disability benefits following an administrative hearing in 1976 when ALJ Parmelee reinstated disability benefits which were terminated in August 1975 and, therefore, the disability benefits received were not overpayments but were disability benefits lawfully received following a hearing. The decision of ALJ Parmelee had not been appealed by the Administration and no other action had been taken by the Administration with reference to ALJ Parmelee's decision.

The Petition for Rehearing was denied by the Ninth Circuit Court of Appeals on September 12, 1996.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: (1) This Petition presents an issue that may affect the general public interest—May the Commissioner of Social Security Administration disregard her own regulations by which she is bound?—May she classify as overpayments disability benefits awarded following an administrative hearing where she did not appeal the decision of the ALJ and took no further action to try to determine the awarded benefits should not have been granted? (2) May the Administrative Law Judge disregard his duty of fully and fairly developing the record to assure claimant's interest are considered? and (3) The Memorandum issued by the Ninth Circuit Court of Appeals is in conflict

with the regulations set forth in the Code of Federal Regulations, Title 20 (20 CFR).

The United States Court of Appeals for the Ninth Circuit found that the issue before the ALJ was whether recovery of overpayments to Seeger should be waived, not whether the fact or the amount of the overpayment was correct. On the contrary, the issue before the ALJ, the United States District Court, and the Ninth Circuit Court of Appeals was whether there was, in fact, an overpayment. Seeger's disability benefits were terminated in August 1975. She then requested a hearing and, following hearing, her disability benefits were reinstated by decision issued April 29, 1976 with the ALJ finding that she continued to be disabled under the provisions of the Social Security Act.

Therefore, Seeger was receiving disability benefits based on a lawful decision by the ALJ who heard the case at the Administration's Office of Hearings and Appeals in West Los Angeles, California. This decision was not appealed by the Commissioner nor was any action taken to refute the legality of the decision or to take any other action with reference to the awarded disability benefits. Seeger continued to receive disability benefits until they were discontinued in January 1984. There is no way that Social Security Disability benefits awarded following a hearing and the decision not appealed can be classified as overpayments. The Commissioner completely ignored a decision by its own Administrative Law Judge that Seeger continued to be disabled and was entitled to the disability benefits she was receiving.

At the hearing before ALJ Kessel there were two issues: (1) whether, in fact, there was an overpayment and, if so, the amount of the overpayment, and (2) if there, in fact, was an overpayment whether recovery of the overpayment can be waived. In his decision the ALJ completely disregarded the issue of the existence of an overpayment. The issue of whether there was an overpayment was raised before United States District Court, Central District of California. The District Court found that at hearing the ALJ indicated there were two issues for resolution—whether there was an overpayment and whether recovery of the overpayment, if any, should be waived—but in his written decision the ALJ correctly stated the issue as whether recovery of the overpayment should be waived and the ALJ's oral

statement at hearing cannot be construed to broaden the scope of the issues in dispute. The last finding contradicts Regulation 404.946 of the Code of Federal Regulations, Title 20 ("20 CFR") which is binding on the Commissioner. The crucial issue was whether an overpayment existed. The issue of whether there was, in fact, an overpayment was pursued before the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals chose to disregard the issue of existence of an overpayment. This would appear to be an abuse of discretion. The inaction by the ALJ and his neglecting to make a finding on the issue of existence of an overpayment has been overlooked by the United States District Court and the Ninth Circuit Court of Appeals.

Regulation 404.501 of 20 CFR defines the term "overpayment" as a payment in excess of the amount due under the Social Security Act. In the instant case Seeger was receiving the amount due her based on the decision of ALJ Parmelee dated April 29, 1976. This decision should have been produced at the hearing before the ALJ as the ALJ had a duty to fully and fairly develop the record to assure claimant's interests are considered. Brown v. Heckler 713 F. 2d 441 (9th Cir. 1983).

In her Motion for Summary Judgment in United States District Court Defendant stated that following termination of benefits in 1975 Plaintiff attended a hearing in 1976 and thereafter benefits were reinstated and she (Defendant) cannot understand the relevance attached to the ALJ's favorable decision awarding Plaintiff

disability benefits on April 29, 1976 (Appendix D). The relevance is that Seeger's disability benefits were reinstated and the benefits she received through January 1984 were lawfully due her. Lawful benefits may not be characterized as overpayments. Disability benefits were paid through January 1984. If there was a question of entitlement to disability benefits Defendant had the legal options of appealing the April 29, 1976 decision or conducting a review provided for under Regulation 404.1589 of 20 CFR. The Defendant continued to pay Seeger benefits through January 1984 even though in 1981 Defendant had charged Seeger with an overpayment. Seeger's due process rights were violated because of inaction and negligence by the Commissioner. Seeger must not be made the

"goat" of the Administration's inaction and negligence. The Administration must not be allowed to cover up its negligence in not following its own regulations and continuing to pursue an overpayment claim which has not been established as existing. This disabled Petitioner must not be made to repay money for benefits lawfully awarded her. The pursuit by the Administration for recovery of benefits lawfully awarded and received would appear to be one bordering on extortion and/or fraud. Justice requires that the matter be remanded to the Ninth Circuit Court of Appeals for a determination of the existence of an overpayment, if any, in view of the favorable decision of ALJ Parmelee dated April 29, 1976 reinstating disability benefits which had been terminated in

1975 and finding evidence supports a finding of continuing disability.

The ALJ did not fully and fairly develop the record as required by Brown supra. ALJ Parmelee's decision was not before him and he made no effort to secure this important document/evidence. The Ninth Circuit Court of Appeals found Seeger failed to make a timely request for reconsideration of the fact and amount of the overpayment resulting in a final and binding determination. There is no (emphasis added) evidence in the official administrative record that Seeger was ever notified that she could request reconsideration of the fact and amount of the overpayment as provided by Regulation 404.502a of 20 CFR. There was a question of Seeger's working and a photograph of her was alleged to have been identified by

someone in the company. A request to cross-examine this individual was denied. A request to cross-examine the custodian of records where Seeger is supposed to have worked was denied. This incomplete record is being used to force Seeger to repay money which was lawfully awarded in the form of disability benefits as provided in the regulations approved by Congress. If the Administration is allowed to use devious means to recover lawfully awarded disability benefits then no one receiving Social Security Disability benefits will feel assured that he is entitled to the disability benefits provided by Congress but will fear that the Administration at a future time will require recovery of the benefits which were used for ordinary and necessary living expenses. The Social Security

Administration is a federal agency which must follow its own regulations and must present itself as a law abiding arm of our government. The Social Security Administration is not above the law. Neither Seeger nor any other disabled individual must be made to pay for the inaction and negligence of the Social Security Administration as this would severely undermine the integrity of an agency of our government. The proper decision in this case has great relevance for providing a policy of action/procedure by the Social Security Administration in its dealings with Social Security Disability recipients. The Social Security Administration must follow its regulations approved by Congress and must not be allowed to pursue a course of recovery of benefits lawfully awarded,

paid and received by disabled individuals without following proper lawful methods.

CONCLUSION

For the reasons set forth above a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: November 30, 1996

Respectfully submitted,

Stephanie M. Simpson

Stephanie M. Simpson
Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 14 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SHARON SEEGER, No. 95-55870
D.C. No. CV-94-01165-SVW
Plaintiff-Appellant
vs. MEMORANDUM*

SHIRLEY S. CHATER, Commissioner of Social Security,**
Defendant-Appellee

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Pursuant to Pub. L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Commissioner of Health and Human Services in Social Security cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with section 106(d) of Pub. L. 103-296, Shirley S. Chater, Commissioner of Social Security, is substitute for Donna E. Shalala, Commissioner of Health and Human Services, as the defendant in this action.

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted August 5, 1996
Pasadena, California

Before: D.W. NELSON, T.G. NELSON and THOMAS, Circuit Judges

Since the parties are familiar with the facts, we need not recite them here.

The issue before the Administrative Law Judge (ALJ) was whether recovery of overpayments to Seeger should be waived, not whether the fact or the amount of the overpayments was correct. Seeger's failure to make a timely request for reconsideration of the fact or amount of overpayment resulted in a final and binding determination. 20 C.F.R. § 404.905; see also Watson v. Sullivan, 940 F.2d 168, 170 (2d Cir. 1991).

We reject Seeger's argument that the initial determination document did not inform her that she had the right to appeal the initial determination. Evidence in the administrative record shows that Seeger was informed of her right to contest the overpayment assessment and that Seeger refused to cooperate with the Social Security Administration (SSA) to resolve the overpayment.

The ALJ's determination that Seeger was not without fault in accepting overpayments is supported by substantial evidence in the record. Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir. 1992). First, there is no evidence in the record indicating that Seeger did not understand her reporting requirements and responsibilities as a representative payee or recipient of disability insurance

benefits and supplemental security income payments. Also, Seeger was "flagrantly uncooperative in providing any necessary information," when the SSA was initially investigating her employment activities for the period between 1975 and January 1984. Furthermore, Seeger implicitly admitted accepting overpayments in her request for waiver of overpayment.

AFFIRMED.

APPENDIX B

STEPHANIE M. SIMPSON, ESQ.

11743 Seminole Circle
Northridge, California 91326
Telephone: (818) 360-4076

Attorney for Appellant
Sharon Seeger

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHARON SEEGER
Plaintiff-Appellant

vs.

SHIRLEY S. CHATER,
Commissioner of Social Security,
Defendant-Appellee

Court of Appeals
No. 95-55870

Central District
No. CV 94-01165-SVW(ALJ)

PLAINTIFF'S PETITION FOR REHEARING

I.

INTRODUCTION

In Counsel's judgment the following situations exist for granting rehearing:

1. A material point of fact and law was overlooked in the decision;

2. An apparent conflict with another decision of the Court which was not addressed in the opinion.

II.

A.

A MATERIAL POINT OF FACT AND LAW WAS OVERLOOKED IN THE DECISION

1. The issue raised before the Administrative Law Judge (hereinafter ALJ) was whether the fact and/or the amount of the alleged overpayment was correct—whether there was an overpayment and, if so, the amount.

Regulation 404.946 of the Code of Federal Regulations, Title 20 (hereinafter 20 CFR) provides the ALJ or any party may raise a new issue at hearing. An issue may be raised even though it arose after the Request for Hearing was filed and even though it has not been considered in an initial or reconsidered determination.

The ALJ erred in not making a finding on the fact (existence) and amount of overpayment, if any. The ALJ is bound by the Regulations. Therefore, his omission of findings on these two issues severely prejudiced Appellant and denied her due process rights to a full and fair hearing.

The ALJ stated (A.R. 104): "So the issues before me are whether or not there was an overpayment, and if there was an overpayment to the claimant and to her

child, whether or not there's any basis to recovery of the overpayment." Counsel replied, "Yes." Further down that page (A.R. 104) the ALJ stated, "First of all, let's go into the facts, was there an overpayment, without getting into -- then we'll get into the issues of, if there was an overpayment, we'll get into the issues of waiver. All right?" to which Counsel answered, "All right."

United States District Court in its Report and Recommendation of United States Magistrate Judge (page 6, footnote 5) states that "during the administrative hearing the ALJ indicated that there were two issues requiring resolution, whether there was an overpayment and whether recovery of the overpayment should be waived (A.R. 104). In his written decision, however, the ALJ correctly stated

the issue as whether recovery of the overpayment should be waived (A.R. 25). The ALJ's oral statement at the hearing cannot be construed to broaden the scope of the issues in dispute." This statement/finding by the United States District Court would appear to be an attempt to affirm the ALJ's not making a finding on all issues raised as provided in Regulation 404.946 of 20 CFR. The issue of existence and amount of overpayment, if any, was timely and properly raised at hearing. Counsel agreed to the ALJ's enumeration of these issues. The ALJ erred in not making a finding on these two important issues. The United States District Court would appear to have abused its discretion in finding that the oral statement by the ALJ at hearing cannot be

used to broaden the scope of the issues in dispute. In her Request for Hearing Appellant denied there was an overpayment (A.R. 94). There was never any notice given to Appellant that the ALJ was disallowing the issues of whether there was an overpayment and, if so, the amount. Regulation 404.946 of 20 CFR must be followed—the issues of existence and amount of overpayment, if any, were timely raised, agreed to by the ALJ and Appellant and may not be ignored. Even on page 98 of the Administrative Record the ALJ stated, "This case concerns alleged overpayment of benefits to the claimant and her child." Parties proceeded to hearing on the issue of whether there existed an overpayment and, if so, the amount and whether waiver may be granted.

2. On page 105 of the Administrative Record Appellant raised the issue of Statute of Limitations which ran out on February 3, 1990. On page 106 of the Administrative Record Appellant raised the issue of Administrative Finality.

The Statute of Limitations ran out on collection of any overpayment on February 3, 1990. Social Security letter to Appellant (A.R. 66) dated August 23, 1991 states Congress passed a law which permits the IRS to withhold overpayments from Federal Income Tax Refunds. This means that the IRS can withhold money from any tax refund due under your SS #565-82-8973 in 1992 (emphasis added). Appellant was advised to contact the IRS about protecting her spouse's share of a joint refund. This is a one-page document even though it states at the bottom, "see next page."

The issue of Administrative Finality was not developed or resolved even though timely raised. Administrative Finality would appear to have foreclosed the Administration's attempt to collect the alleged overpayment as would a claimant's attempt to reopen a claim/determination after a statutory period of time.

3. Appellant is entitled to discover crucial evidence in the possession of the Commissioner. Her due process rights were violated by the Defendant's flagrantly disregarding and not cooperating in providing this necessary information.

The official Administrative Record sent Appellant consists of fourteen exhibits enumerated in pages 34 through 95 and the transcript of the oral hearing on March 5, 1993, pages 96-140. In her brief to United States District Court Defendant

attached Exhibits 1 through 18, a total of sixty-one pages. These exhibits may not be referred to or used in the decision as they are not part of the official Administrative Record. The Administrative Procedure Act provides that a decision must be made on evidence in the official record of hearing. It would appear that Defendant is trying to get into the record documents which should have been part of the official Administrative Record.

In Huseman v. Finch 424 F. 2d 1237 (10th Cir. 1971) the Court found a plaintiff is entitled to discover and to inspect documents used by the Administration in determining an overpayment. There must not be an accusation/charge of an overpayment without production of the documents upon which the charge is made.

The Administration had charged Plaintiff with an overpayment in 1981. The charge was overpayment from August 1975 to January 1984. Checks are kept by the Treasury Department for six years and nine months. Copies of these checks were available for inspection when Appellant was notified of an alleged overpayment in 1981. This evidence should have been preserved for production at hearing. Appellant testified disability checks stopped in December 1993. The Administration allowed crucial evidence to be destroyed. Page 6 of the Administrative Record contains Appellant's motion/request for production of benefit checks from August 1975 to January 1984.

Appellant first became aware of an overpayment in 1981 (A.R. 138). The official Administrative Record does not

contain any document/evidence notifying Appellant of an overpayment and advising her that she can request reconsideration. Attached hereto as Exhibit 1 is a copy of the type of notice sent a claimant stating the amount of overpayment and the right to appeal the fact and amount of overpayment. If the Court's copy of the Administrative Record contains such a document then Appellant has not been provided with a copy of an official Administrative Record as required. Since there is no document in the Administrative Record notifying Appellant of the overpayment determination and advising her of her right to request reconsideration it must be determined Appellant was never advised of her right to request reconsideration. Would this Court please point out where the evidence in the Administrative Record shows that

Appellant was informed of her right to contest the overpayment assessment as Appellant's record contains no such document.

The Court correctly states that Regulation 404.905 of 20 CFR provides that failure to make a timely request for reconsideration of the fact or amount of overpayment results in a final and binding determination. One wonders how a lay person or anyone would know that he should make a timely request for reconsideration if not advised of that right. There is absolutely no evidence in the official Administrative Record that Appellant was so advised of her right.

Regulation 404.911 of 20 CFR provides good causes for missing the deadline to request review. These include "whether our action misled you" and "you did not

receive notice of the determination or decision." It would appear both of these reasons have been met—the Administration's action misled her by not notifying her of her right to request reconsideration and she did not receive notice of the determination or decision as required. The issue of existence and amount of overpayment raised at the administrative hearing was valid and not foreclosed.

4. After termination of disability checks in 1975 Appellant appeared before an Administrative Law Judge in 1976 in the same building (11000 Wilshire, Los Angeles) where the hearing on March 5, 1993 was held and she received a favorable decision finding she was still disabled under the Act. She also received a retroactive check for benefits due her from the time her benefits were terminated

in 1975. The decision of that hearing was not produced even though requested. That decision is not part of the official Administrative Record but is an exhibit in Defendant's Brief to the United States District Court. If the Administration was charging Appellant with an overpayment and determined she was not disabled after August 1975 why didn't the Administration on its own request review of that 1976 decision of its own ALJ? It would appear Appellant was found disabled and entitled to disability benefits until they were terminated in December 1993. If the Administration notified Appellant of an overpayment in 1981 why did it continue to send disability checks until January 1984? These are very inconsistent actions by the Administration and would imply that it accepted the decision of its ALJ in 1976

that appellant was disabled. Therefore, she was entitled to the disability checks received until terminated in December 1983.

5. A request for waiver is not an admission that an overpayment exists or existed. This Court is assuming that because Appellant applied for a waiver and admitted receiving benefits she is referring to the benefits received as overpayments. Her request for waiver (which the Administration advised her to file) refers to benefits received and she thought the benefits were due her because she was totally disabled (A.R. 68).

6. In Appellee's Brief filed with this Court on page 14, footnote 2, she states the attorney for the Commissioner did consider requesting the Agency to remand this case for further development

of the record prior to District Court review. However, since the existence of the overpayment was not before the ALJ she doubted that the Agency would accept remand.

Appellant submits the existence of the overpayment was properly raised as an issue at hearing and was an issue before the ALJ. Regulation 404.946 of 20 CFR.

On page 15 of Appellee's Brief she states if this Court were to find the ALJ did not properly develop the record with regard to the existence of the overpayment the remedy would be for this Court to direct the District Court to remand this case to the Agency in order for the record to be further developed.

The record was not fully and fairly developed by the ALJ as required by this Court in Brown v. Heckler 713 F. 2d 441

(9th Cir. 1983) so that Appellant's interests were considered. The record does not have all documents necessary for a fair decision so that one can say justice has been achieved.

The case should have been remanded for full development in view of the poorly prepared official Administrative Record.

7. As stated as a quote by Thomas G. Nelson, Judge, 9th United States Circuit Court of Appeals in his Profile in Los Angeles Daily Journal on Friday, August 23, 1996, "It is tempting to decide how policy should be. After all, Congress is not always right. But neither are we. It is our job to decide what the policymakers intended."

Counsel humbly offers an answer. It would appear that in this case Congress intended that the Administration should

have informed Appellant of her right to request reconsideration of its charge of overpayment, if any, and fully and fairly developed the record since benefits were terminated in August 1975 and disability benefits were reinstated by its own ALJ in 1976 retroactive to the 1975 termination and Appellant, based on a favorable decision, continued to receive benefits until December 1983. Congress would not wish the Administration to be rewarded for its shortcomings but would prefer that a disabled Appellant be treated fairly with all the protection offered her by law. Her due process rights must not be violated.

B.

AN APPARENT CONFLICT WITH ANOTHER DECISION OF THE COURT WHICH WAS NOT ADDRESSED IN THE OPINION

In Solis v. Schweiker 719 F. 2d 30 (9th Cir. 1983), a decision written by Judge Dorothy W. Nelson who was on the judicial panel in the instant case, the Court stated that when a disputed written report is "crucial" to the case some form of cross-examination is warranted and the Applicant is entitled to "such cross-examination as may be required for a full and true disclosure of the facts," citing from A.P.A. at 5 U.S.C. 556(d). The Court further stated where answers are "cursory and unilluminating" or where issues other than foundation and expertise are at stake personal appearance for cross-examination, if demanded, is necessary.

Request was made to have the custodian of work records (A.R. 36-45, 50-55) be produced for a determination of the accuracy of the records which were disputed by Appellant. On April 9, 1980 (before she was notified of an alleged overpayment) Appellant cooperated (emphasis added) with the Administration and reviewed the work records and stated she did not work for the named employers during the time specified (A.R. 47).

Request was made to cross-examine the persons who supposedly identified Appellant as working during the stated time periods from a picture photograph. The Administration stated (A.R. 90) statements from employers involved verified through picture identification that the employee was the wage earner. Request was also

made for production of the picture used for identification. Neither of the requests was granted. The work records and picture identification must be considered crucial written documents. The Administrative Procedure Act provides that opportunity for rebuttal of evidence in the record must be allowed. Cross-examination should have been provided.

In Defendant's brief to District Court some picture exhibits are included with an "X" under a photograph of a female. In Counsel's opinion the pictures marked with an "X" do not look like Appellant.

In a criminal case the accused is allowed to face his accuser. This Court has gone out of its way to protect a person accused of murder to make sure he

is afforded all the protection provided by law and his due process rights are not violated. Should not the same consideration be given Appellant who stated she did not work for the employers named in the time period specified and whose picture was circulated among different people for identification, whose disability benefits were terminated in August 1975 and reinstated from August 1975 following a hearing in 1976 before an ALJ of the Administration and disability benefits were paid through December 1983, who is being accused of not requesting reconsideration of an alleged overpayment when there is no evidence she was ever told of a right to request such reconsideration? What was the Administration doing during the period August 1975 to

December 1983? It terminated benefits which were reinstated, it notified Appellant in 1981 there was an overpayment and continued to pay benefits through December 1983.

III.

CONCLUSION

This case should have been remanded for proper development prior to filing in United States District Court so that a fair decision could be made on the evidence. The Administration is bound by Regulation 404.946 of 20 CFR. The issue of the existence and amount of overpayment, if any, was properly before the ALJ who so stated in the record and Counsel agreed with him. There is absolutely no evidence in the record of the Administration notifying Appellant of her right

to request reconsideration of an alleged overpayment. The Administration advised her to file a Request for Waiver which she did and on the waiver she stated she received disability benefits which she felt were due her because she was totally disabled. Admitting she received benefits does not translate into an implication or explicit admittance that the benefits received constituted an overpayment. The poorly developed record deprived Appellant of a full and fair hearing to which she is entitled. Speculation as to what the documents may mean must not be used to railroad Appellant and reward the Commissioner for the poorly prepared Administrative Record. Appellant is entitled to all the protection provided by law.

If the decision is not reversed the case should be remanded for a full and

fair development of the record so that a proper and fair decision may be reached. Appellant is entitled to a fair decision and not speculation based on a fully developed record.

Dated: August 28, 1996

Respectfully submitted,

/s/ Stephanie M. Simpson

Stephanie M. Simpson
Attorney for
Plaintiff-Appellant

FORM 7

BRIEF FORMAT CERTIFICATION

PURSUANT TO

CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the opening/answering/reply brief is

___ Proportionately spaced, has a typeface of 14 points or more and contains ____ words, or is

___ Monospaced, has 10.5 or less characters per inch and

___ Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs), or

___ Contains ____ words.

Date: 8-31-96

/s/ Stephanie M. Simpson

Signature of Filing Party

CERTIFICATE OF SERVICE

I hereby certify that I served the within Plaintiff's Petition for Rehearing on the Attorneys for Appellee by mailing a copy of said document on August 31, 1996 addressed as follows:

Attorney Karen J. Aviles
Social Security Administration
Office of the General Counsel
6401 Security Boulevard
Baltimore, Maryland 21235

Executed on August 31, 1996 at Northridge, California.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/s/ Stephanie M. Simpson

Stephanie M. Simpson
Attorney for Plaintiff

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 12 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SHARON SEEGER, No. 95-55870
D.C. No. CV-94-01165-SVW
Plaintiff-Appellant

vs. ORDER

SHIRLEY S. CHATER, Secretary
of Health and Human Services,
Defendant-Appellee

Before: D.W. NELSON, T.G. NELSON and THOMAS, Circuit Judges.

Applicant's petition for rehearing is DENIED.

STEPHANIE M. SIMPSON
ATTORNEY AT LAW
11743 Seminole Circle
Northridge, CA 91326
Telephone (818) 360-4076

Mrs. Seeger:

Enclosed is copy of decision denying rehearing. You have ninety days from September 12, 1996 to go to U.S. Supreme Court. That costs $300.00 to file and a bound brief must be filed.

If you don't want to do that file for disability and let them take money from that to pay the overpayment. You can keep filing for a waiver of the overpayment. The fact you used different Social Security numbers seemed to be the crux of the matter.

You should also check with IRS in case you file a joint return so that none

of the refund due to your husband's income is taken to repay the overpayment.

Please let me know what you wish to do.

/s/ Stephanie M. Simpson

Stephanie M. Simpson
Attorney

APPENDIX D

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

Sharon Jones
10139½ Fernglen Ave.
Tujunga, CA 91042

EFFECTUATION NECESSARY

NOTICE OF FAVORABLE DECISION

PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisfied with this decision, there is no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days following the date shown below. A request for review may be filed by you (or your representative) at your local social

security office, or it may be filed with the hearing office or the Appeals Council.

The Appeals Council may decide on its own motion within 90 days following the date shown below to review and possibly to change the decision. If the Appeals Council decides to review the decision on its own motion, you will be notified promptly.

Unless you file a timely request for review by the Appeals Council or unless the Appeals Council reviews the decision on its own motion, you may not obtain a court review of your case under sections 205(g), 1631(c)(3), and 1869(b) of the Social Security Act.

This notice and enclosed copy of decision mailed

April 29, 1976

CC:

Name and Address of Representative:

Dennis H. Devermont, Atty. DEFENDANT'S
613 Wilshire Boulevard
Santa Monica, CA 90401

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION EFFECTUATION NECESSARY

In the case of
Sharon A. Jones,
Claimant

Claim for
Continuance of
Disability Benefits

Social Security No.:
565-82-8973

This case is before the Administrative Law Judge upon a timely request for hearing filed by the claimant, who is dissatisfied with the prior determination holding that entitlement to a period of disability and disability insurance benefits ended with the close of July, 1974.

In view of the Administrative Law Judge's conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.

After careful consideration of all the evidence of record, the Administrative Law Judge finds that the claimant's "disability" has not ceased.

It is the decision of the Administrative Law Judge that the claimant continues to be entitled to a period of disability and to disability insurance benefits.

Date: April 29, 1976

Glenn C. Parmelee
Administrative Law Judge

mh

Official Form No. 10
July 1973 Edition
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT
MEMORANDUM

TO: File Date: April 29, 1976

FROM: Glenn C. Parmelee
Administrative Law Judge

SUBJECT: Sharon A. Jones
S.S. #565-82-8973

After it was found that the claimant's disability had ceased in May, 1974, she continued to complain of persistent and severe pain in her knees. This was believed to be on a subjective basis. At the hearing, the claimant testified as to the continued pain and stated that repeat surgery on her knees had been recommended. A vocational expert was of the opinion that, if the claimant's testimony was correct, there were no jobs that she could perform because of the pain

in her knees. Clinical notes from the UCLA Hospital, as of March 25, 1976, indicate that the claimant's pain is real and confirm the fact that surgery is recommended (Exhibit B-18).

/s/ Glenn C. Parmelee

Glenn C. Parmelee
Administrative Law Judge

mh

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
APR 18 1995

SHARON SEEGER,
Plaintiff

vs.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant

No. CV 94-1165-SVW(AJW)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE[1]

PROCEEDINGS

Plaintiff seeks review of a decision by defendant, the Secretary of Health and Human Services, denying plaintiff's request for waiver of recovery of an overpayment. Plaintiff moved for summary

---

[1]This Report and Recommendation is submitted pursuant to 28 U.S.C. § 636 and General Order No. 194 of the United States District Court for the Central District of California.

judgment, and defendant filed a cross motion for summary judgment. Defendant's cross motion should be granted, and plaintiff's motion should be denied.

STATEMENT OF ADMINISTRATIVE PROCEDURES

Beginning during the early and mid-1970's, plaintiff received disability insurance benefits, supplemental security income payments, and (as representative payee) child's benefits for her daughter. [A.R. 24]. After investigation, defendant concluded that plaintiff had obtained employment under social security numbers other than her own, and had failed to report her wages and work activity to defendant. [A.R. 24]. Defendant determined that the amount of the overpayment was $33,075. [A.R. 24, 60]. In round numbers, that sum was divided between

$22,038 overpaid to the claimant, and $11,036 overpaid to the claimant as representative payee for her child. [A.R. 24, 62, 66, 98].

The record indicates that plaintiff was notified of the overpayment, and that repeated demands for payment were made. [A.R. 60-65]. The record also indicates that plaintiff and her daughter did not cooperate with defendant's attempts to resolve the overpayment. [A.R. 24, 61]. There is no evidence that plaintiff or her daughter ever made a timely request for reconsideration of the overpayment determination.

Plaintiff and her daughter requested waiver of recovery of the overpayment in December, 1991. [A.R. 67-74, 75-82]. The thrust of plaintiff's request for waiver was her claim that she was not at fault in

causing the overpayment or accepting the benefit payments because she was disabled, she did it to support her child, and her husband was abusive and alcoholic. [A.R. 68]. Plaintiff implicitly conceded receipt of the overpayment and failure to report her employment throughout her request for waiver of recovery of overpayment. [A.R. 67-74]. Plaintiff also stated: "I also do not think the overpaid is the right amount." [A.R. 74].

Defendant denied both requests for waiver of recovery of overpayment. [A.R. 83-93]. Pursuant to plaintiff's request, an administrative hearing was held on March 5, 1993. [A.R. 96-98]. On April 5, 1993, the administrative law judge ("ALJ") denied plaintiff's request for waiver of recovery of any portion of the overpayment. [A.R. 24-29]. The ALJ found that

plaintiff was not without fault in causing or accepting the overpayment of all of the benefits, including the child's benefits plaintiff received as a representative payee. [A.R. 29]. The ALJ also found that the child beneficiary was without fault in causing or accepting the overpayment, and that recovery of the overpayment from the child beneficiary would be contrary to equity and good conscience. [A.R. 28]. Plaintiff's request for review by the appeals Council resulted in a determination that "no change is warranted in the Administrative Law Judge's decision" and that "there is no basis . . . for granting your request for review." [A.R. 3, 2]. Therefore, the ALJ's determination stands as the final decision of defendant.

PLAINTIFF'S CONTENTION

Plaintiff contends that defendant's decision should be reversed for the following reasons: (1) the determination that an overpayment in the amount of alleged was made is not supported by substantial evidence; (2) the ALJ did not fully and fairly develop the record; (3) defendant failed to produce requested documents, such as copies of the checks issued by defendant and received by plaintiff.[2] Plaintiff does not challenge the waiver of recovery of overpayment from plaintiff's daughter.

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[2]Plaintiff also argues that defendant violated the order of the Magistrate Judge to whom this matter previously was assigned by filing a brief that exceeded ten pages in length. Plaintiff asks the Court to disregard pages 11 through 18 of defendant's brief. Strict enforcement of that provision of the Order Re Further Proceedings dated February 28, 1994 would serve no purpose.

FACT AND AMOUNT OF OVERPAYMENT[3]

A claimant may challenge a notice of overpayment in two ways. First, the claimant may request reconsideration of the fact or the amount of the alleged overpayment. A request for reconsideration denies that the overpayment actually

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[3]Defendant has attached to her motion for summary judgment various documents relating to the investigation defendant conducted of plaintiff, reconstructed notices to plaintiff regarding the overpayments, and the like. On this appeal, the Court is limited to reviewing defendant's decision based on the administrative record, and cannot consider exhibits or testimony that were not presented to the ALJ or the Appeals Council. Highbee v. Sullivan, 975 F.2d 558, 562 (9th Cir. 1992), citing Russell v. Bowen, 856 F.2d 81, 84 (9th Cir. 1988). Because the exhibits are not properly before the Court, however, they may not be considered in resolving this appeal. Obviously, the quality of the record would have been much improved if defendant had ensured that the exhibits had been included in the administrative record. In the circumstances of this case, however, the failure to include those exhibits in the administrative record was harmless.

occurred, or that the amount allegedly overpaid was accurately calculated. Reconsideration must be requested within sixty days of the initial notice of an overpayment or the right to make the request is lost, absent a showing of good cause for the delay. See 20 C.F.R. §§ 404.909, 404.911, 416.1409, 416.1411 (1994). Second, a claimant may request waiver of recovery of overpayment. A request for waiver of recovery of overpayment concedes the fact and the amount of overpayment, and merely challenges defendant's authority to require repayment or recoupment. A request for waiver of recovery of overpayment may be made at any time, even after the overpaid amount has been repaid or recouped.

There is evidence in the record that plaintiff received notice of the fact and

amount of the overpayment determination, as well as repeated demands for payment. There is no evidence, however, that plaintiff formally requested reconsideration of the fact or the amount of the alleged overpayment. Moreover, by filing a request for waiver of recovery of overpayment, plaintiff implicitly acknowledged, and confirmed by her answers throughout the form she completed and signed under penalty of perjury, that at least some overpayments had been received. [A.R. 2]. Plaintiff's statement in her request for waiver of recovery of overpayment that she questioned the amount of the overpayment is insufficient to constitute a request for reconsideration. Similarly, plaintiff cannot avoid her waiver of her right to seek reconsideration of the overpayment determination by indicating her desire to

challenge the fact or amount of the overpayment in her request for an administrative hearing. [A.R. 94]. Not only were such challenges untimely, but plaintiff failed to present any detailed account of the respects in which the amount of the overpayment was inaccurate.[4]

Since Plaintiff did not request reconsideration of the fact or amount of the overpayment on a timely basis, but only sought waiver of recovery of the overpayment, the correctness of defendant's determination as to the fact or amount of the overpayment is not before the Court. E.g., Watson v. Sullivan, 940 F.2d 168, 171 (6th Cir. 1991); see 20

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[4]In addition, plaintiff has made no showing of good cause as to why her failure to seek reconsideration of the overpayment determination promptly should be excused. 20 C.F.R. §§ 404.911, 416.1411 (1994).

C.F.R. § 404.905 (1994) ("An initial determination is binding unless you request reconsideration within the stated time period . . . ."). For this reason, virtually all of plaintiff's attacks on defendant's decision are beside the point.[5]

WAIVER OF RECOVERY

OF OVERPAYMENT

Defendant may waive recovery of an overpayment if the claimant satisfies a two-pronged test. First, the claimant must show that he or she was without fault in causing the overpayment. Second, the

---

[5]During the administrative hearing, the ALJ indicated that there were two issues requiring resolution, whether there was an overpayment and whether recovery of the overpayment should be waived. [A.R. 104]. In his written decision, however, the ALJ correctly stated the issue as whether recovery of the overpayment should be waived. [A.R. 25]. The ALJ's oral statement at the hearing cannot be construed to broaden the scope of the issues in dispute.

claimant must show that recovery or adjustment of the overpayment would either (a) defeat the purpose of the Social Security Act, or (b) be contrary to equity and good conscience. 42 U.S.C. § 404(b); 42 U.S.C. § 1383(b); 20 C.F.R. §§ 404.506 (1991), 416.550 (1994). The claimant must satisfy the first prong of the test and one of the two (in the case of Title II) or three (in the cast of Title XVI)[6] aspects of the second prong of the test to qualify for waiver of recovery of an overpayment. Demonstrating that the claimant was without fault in causing the overpayment is a necessary (but not sufficient) condition for obtaining a waiver. The

---

[6]Under Title XVI, there is a third basis for satisfying the second prong of the test, namely, that recovery of the overpayment would "[i]mpede the administration of Title XVI due to the small amount involved."

recipient of an overpayment has the burden of proving that the two-pronged test has been satisfied. See Anderson v. Sullivan, 914 F.2d 1121, 1122 (9th Cir. 1990); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984); Watson, 940 F.2d at 171.[7]

With respect to disability insurance benefits, there are two categories of overpayments, "entitlement overpayments"

---

[7]Although the cases dealing with waiver of recovery of overpayments involve various types of benefit payments, there is no indication that a different burden of proof applies depending on the particular type of benefit payments or title of the Social Security Act involved. See Valente v. Secretary of Health and Human Services, 733 F.2d 1037, 1040 n.3 (2d Cir. 1984) (noting that the standard for waiving recovery of overpayments under 42 U.S.C. § 404(b) parallels the standard for waiving recovery of overpayments under 42 U.S.C. § 1383(b)(1)), cited with approval in Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) ("There is support, then, for resolving questions under Title XVI with the approach utilized under Title II.").

and "deduction overpayments." An "entitlement overpayment" occurs when a benefit payment is made to a person who fails to meet one or more requirements for entitlement to such payment, or where a benefit payment exceeds the amount to which the person is entitled. 20 C.F.R. § 404.510a (1991). A "deduction overpayment" on the other hand, results from circumstances which may cause deductions from a person's benefits, and which should have been brought to the attention of defendant by immediate report or by return of a benefit check. 20 C.F.R. § 404.511 (1994).

With respect to supplemental security income, on the other hand, no distinction is made between entitlement overpayments and deduction overpayments. 20 C.F.R. § 416.537 (1994). For the purposes of

supplemental security income, the term "overpayment" means "payment of more than the amount due for any period, including any amounts of State supplemental payment which are due and administered by the Social Security Administration." 20 C.F.R. § 416.537 (1994).

It is unclear whether the overpayment made to plaintiff was a deduction overpayment or an entitlement overpayment, although the ALJ appears to have viewed it as the latter. [A.R. 27-28]. In either case, the outcome is the same.

Insofar as deduction overpayments of disability insurance benefits are concerned, defendant's regulations specify the conditions under which a deduction overpayment will be found to have been made "without fault" on the part of the recipient. 20 C.F.R. § 404.511 (1994). A

recipient is not without fault where the evidence shows "either a lack of good faith or failure to exercise a high degree of care in determining whether circumstances which may cause deductions from his [or her] benefits should be brought to the attention of the Administration by an immediate report or by return of a benefit check." 20 C.F.R. § 404.511(a) (1994). By contrast, a recipient is "without fault" where one of the circumstances specified in 20 C.F.R. § 404.510(a) - (n) (1994) is present.

With respect to the overpayment of supplemental security income benefits and the entitlement overpayment of disability insurance benefits, however, the definition of "without fault" is different. In this context, "[w]hether an individual is 'without fault' depends on all the

pertinent circumstances surrounding the overpayment in a particular case." 20 C.F.R. § 416.552 (1994) (emphasis in original); see also 20 C.F.R. § 404.507 (1994). Defendant considers, among other things, "the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition)." 20 C.F.R. § 416.552 (1994); see also 20 C.F.R. § 404.507 (1994). Defendant is required to take into account any

physical, mental, educational or linguistic limitation the recipient of the overpayment may have. 20 C.F.R. § 416.552 (1994); see also 20 C.F.R. § 404.507 (1994). The regulations further provide:

> Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:
>
> (a) Failure to furnish information which the individual knew or should have known was material; (b) An incorrect statement made by the individual which he [or she] knew or should have known was incorrect (this includes the individual's

> furnishing his opinion or conclusion when he was asked for facts); or (c) The individual did not return a payment which he [or she] knew or could have been expected to know was incorrect.

20 C.F.R. § 416.552 (1994); see also 20 C.F.R. § 404.507 (1994).

The ALJ concluded that "the claimant was clearly at fault in regard to the entire overpaid amount, including both the disability insurance benefits and supplemental security income benefits she received for herself as well as those received as a representative payee for the beneficiary." [A.R. 27]. The ALJ further found that "[t]he claimant's acceptance of benefits at a time she was working, when she clearly knew or could have been

expected to know that she was not entitled to benefits, shows a conscious action on the claimant's behalf to evade the social security laws and regulations." [A.R. 27-28]. The ALJ also found that there was nothing in the record which suggested that plaintiff lacked the mental capacity to understand her duty to report her wages and employment to defendant [A.R. 27].

Substantial evidence supports the ALJ's determination that plaintiff failed to satisfy her burden of proving that she acted without fault under any of the applicable standards. The record shows that plaintiff knowingly and intentionally worked under social security numbers other than her own and failed to report her wages and employment activity to defendant. [A.R. 100-101]. Further, plaintiff understood at the time that what she was

doing was wrong. [A.R. 138-139].

In addition, during the administrative hearing, plaintiff appeared to be capable of responding to questions coherently. Her completion of the request for waiver of overpayment form shows that she is able to read and write. Nothing in the record suggests that plaintiff was too aged, poorly educated, unintelligent, or physically or mentally disabled to have been able to understand her responsibility to report her wages and work activity to defendant. Viewed from the perspective of plaintiff's own circumstances and with whatever mental and physical limitations plaintiff may possess, a reasonable person in plaintiff's circumstances could have been expected to know that she was required to report her wages and work activity to defendant. Indeed, plaintiff

does not contend that she was ignorant of or unable to understand her obligations. Instead, plaintiff offered various excuses for her misconduct that the ALJ correctly found to be inadequate [A.R. 27].

The waiver of recovery of overpayment provisions "are intended to benefit only designated payees who, through no fault of their own, have received more benefits than those to which they are entitled." Powderly v. Schweiker, 704 F.2d 1092, 1096 (9th Cir. 1983). It would be an abuse of the social security program to grant a waiver of recovery of overpayment to a recipient who surreptitiously worked under social security numbers other than her own in order to simultaneously collect unreported wages and benefits.

RECOMMENDATION

It is recommended that the Court

issue an order: (1) approving and adopting this report and recommendation; (2) granting defendant's cross motion for summary judgment; (3) denying plaintiff's motion for summary judgment; and (4) entering judgment affirming the decision of defendant, the Secretary of Health and Human Services.

DATED: 4.14.95

/s/ Andrew J. Wistrich

ANDREW J. WISTRICH
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
APR 18 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

SHARON SEEGER,
Plaintiff

vs.

DONNA E. SHALALA, Secretary of Health and Human Services,
Defendant

No. CV 94-1165-SVW(AJW)

JUDGMENT

IT IS ADJUDGED that plaintiff's Motion for Summary Judgment is denied, that defendant's Cross Motion for Summary Judgment is granted, and that Judgment is entered in favor of the defendant, Secretary of Health and Human Services.

DATED: _____

_____
STEPHEN V. WILSON
United States District Judge

APPENDIX F

Stephanie M. Simpson, Esq.
11743 Seminole Circle
Northridge, CA 91326
Telephone: (818) 360-4076

Attorney for Plaintiff
SHARON SEEGER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHARON SEEGER, No. CV 94-1165-SVW(AJW)
Plaintiff

vs.

PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION AND PROPOSED JUDGMENT OF UNITED STATES MAGISTRATE JUDGE
(Not Set for Date Certain)

SHIRLEY S. CHATER, Commissioner of Social Security,
Defendant

Plaintiff respectfully objects to the Report and Recommendation and Proposed Judgment of United States Magistrate Judge as follows:

1. The Court found that there is no evidence that Plaintiff or her daughter

ever made a timely request for reconsideration of the overpayment determination. There is no evidence in the record that Plaintiff was ever (emphasis added) informed that she could file a request for reconsideration. She was informed that she could file a waiver request, which she did (A.R. 66).

2. Regulation 404.502a of the Code of Federal Regulations, Title 20 (hereinafter 20 CFR) provides that whenever an initial determination is made that more than the correct amount of payment has been made notice regarding waiver of adjustment or recovery shall be sent the overpaid individual. There is no evidence in the record of an initial determination of any alleged overpayment—just the notice of August 22, 1991 (A.R. 66) stating Plaintiff may file a waiver request, which

she did. Defendant's exhibit 15 (pages 76, 77) would not appear to meet the requirements of the initial determination. There is no information provided regarding the filing of a request for reconsideration of the determination. The record appears to lack the required initial determination of overpayment and notice to plaintiff of her right to request reconsideration of the determination.

3. The Court found that Plaintiff's statement in her request for waiver of recovery of overpayment that she questioned the amount of the overpayment is insufficient to constitute a request for reconsideration. The Court appears to be charging Plaintiff with negligence in not filing a request for reconsideration and then questioning the amount of overpayment, if any, in her waiver request. The

negligence for not filing a request for reconsideration must be placed squarely on the Defendant who had a duty to inform Plaintiff that she could file a request for reconsideration. Plaintiff has the same right as every other individual to be informed that she may file a request for reconsideration to appeal a determination. She was not so informed. Plaintiff was informed she could file a waiver request, which she did. Therefore, justice requires that the waiver request be treated as a reconsideration.

4. Regulation 404.946 of 20 CFR provides that any party may raise a new issue at hearing even though it arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination. It would appear that the issues of fact and

amount of overpayment, if any, were timely raised. Therefore, the correctness of Defendant's determination as to the fact or amount of the overpayment is before the United States District Court.

5. In footnote 5, page 6, the Court found that the ALJ's oral statement at hearing indicated there were two issues—the issue of whether there was an overpayment and whether recovery should be waived—that in his written decision the ALJ correctly stated the issue as whether recovery of the overpayment should be waived, and that the ALJ's oral statement at the hearing cannot be construed to broaden the scope of the issues in dispute. Regulation 404.946 of 20 CFR provides for the raising of issues at hearing. The ALJ is bound by the regulations. Therefore, the issue of whether

there was an overpayment was properly before the ALJ.

6. Plaintiff is being charged with working at different companies based on a picture identification and written statements from some individuals. No opportunity was ever provided for cross-examination of the author of this written concise report as provided in Solis v. Schweiker 619 F. 2d 301 (9th Cir. 1983). Plaintiff is being prejudiced by the admission of this unsubstantiated evidence without an opportunity to verify the accuracy of the statements. She is being adjudged guilty of working at various companies based on unsubstantiated evidence in a court of law. The United States District Court is a tribunal held in the highest regard and highly respected for its findings and judgments in dispensing justice fairly and

evenly. Its findings are based on evidence which has been examined and found accurate and truthful. The evidence based on photographic identification must not be considered such truthful and accurate evidence. Plaintiff is being found guilty based on this flimsy evidence.

Plaintiff's disability benefits ceased in 1974. She testified she then attended a hearing in the same building as the hearing on March 5, 1993 and benefits were reinstated. Defendant's Exhibit 2, pages 21-23, supports Plaintiff's testimony. Plaintiff testified benefits stopped in 1981 and she received only one check in 1982 (A.R. 133).

No checks have been produced to determine the endorsement on the checks. If she received no checks after 1981—only the one check in 1982—a serious question

arises as to whether further checks were actually sent by the Administration and, if so, who cashed the checks. Plaintiff must not be charged with the misdeeds of another.

There is a serious question as to how long Plaintiff worked when she was receiving checks. There is also the question of a trial work period while working and receiving checks. Claimants are entitled to a trial work period.

The United States District Court, the same as the Administrative Law Judge, appears to be charging and condemning a Plaintiff based on evidence that appears flimsy, inaccurate, and unsubstantiated and not as required in a court of law. Plaintiff's due process rights are being severely violated because of the Administration's failure to fully and fairly

develop the record to assure claimant's interests are considered. This is the standard set out in Brown v. Heckler 713 F. 2d 441 (9th Cir. 1983). The United States district Court must not accept the poor development of the case by the Administration but must insist that the standard set by the United States Court of Appeals for the Ninth Circuit be followed—the case must be fairly (emphasis added) and fully developed so that claimant's interests are considered. The United States District Court must continue with its high standard of dispensing justice and demand the same high standards from the Administration. This procedure will insure that Plaintiff is accorded justice under our system of government.

Date: April 24, 1995

Respectfully submitted,

/s/ Stephanie M. Simpson

Stephanie M. Simpson
Attorney for Plaintiff